U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
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Issue Date: 17 September 2007

Case No.: 2006-LHC-1715

OWCP No.: 08-124179

In the Matter of:

V.Q.
Claimant

v.

SIGNAL INTERNATIONAL,
Employer

and

AIU INSURANCE COMPANY
Carrier

APPEARANCES:

QUENTIN D. PRICE, ESQ.
On Behalf of the Claimant

ALLEN D. HEMPHILL, ESQ
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by Claimant against Employer and Carrier.[2]

[1] 33 U.S.C. §§901-950.
[2] Employer and Carrier are collectively referred to as Employer for convenience.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 18 Jul 06. All parties were represented by counsel. On 27 Feb 07, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant

Exhibits[4]
Joint Exhibit (JX) 1
Claimant's Exhibits (CX) 1-13
Employer's Exhibits (EX) 1-35[5]

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[6]

1. The alleged injury would fall under the jurisdiction and coverage of the Act.

2. On 25 Sep 03, in the course of his work, Claimant picked up a block of wood and suffered some degree of pain and injury.

3. The injury occurred in the course and scope of employment.

4. An Employer/Employee relationship existed at the time of the accident.

5. Employer was properly notified of the injury.

6. There was proper and timely controversion.

7. Claimant's average weekly wage (AWW) at that time was $399.59.

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] EX-10 and EX-30 were the deposition and interrogatory responses of a witness also testifying live at the hearing (Claimant). Consequently, counsel were informed that only those pages specifically cited would be considered a part of the record.
[5] Some of Employer's exhibits are exact duplicates of others. (E.g. EX- 14, 16, and 19.)
[6] JX-1.Tr. 8-10.

FACTUAL BACKGROUND

On 25 Sep 03, while working in a dry dock for Employer, Claimant was moving a large piece of wood and injured his back.

ISSUES & POSITIONS OF THE PARTIES

Claimant maintains that he has never been able to return to the work he was doing as a laborer at the time he was injured on 25 Sep 03. He concedes that immediately following his injury he did continue to work for Employer as a painter and then worked for brief periods as a fire watch for Employer and another company. However, he argues that those did not have the same physical requirements as his original laborer position. He argues that he will not reach maximum medical improvement until he has a chance to undergo the treatment recommended by his doctor. Consequently, he maintains that in the absence of evidence from the Employer of suitable alternative employment, he has been temporarily totally disabled since the date of his injury (with the exception of the periods during which he was employed). He seeks corresponding compensation and an order to provide medical care.

Employer responds that Claimant's injuries were short term in nature and he requires no medical care relating to his 25 Sep 03 accident. It also argues that he was able to return to his original work before sustaining any loss of earning capacity. In the alternative, it argues that there is suitable alternative employment providing post injury earning capacity which is equal to his AWW.

LAW

While the Act is construed liberally in favor of the claimant,[7] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[8] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[9]

Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[10] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[11] The presumption takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.[12]

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[7] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).
[8] 5 U.S.C. § 556(d).
[9] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[10] 33 U.S.C. § 902(2).
[11] 33 U.S.C. § 902(a).
[12] *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998).

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.[13] These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.[14]

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.[15]

Once the presumption applies, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that claimant's condition was neither caused by his working conditions nor aggravated, accelerated, or rendered symptomatic by such conditions.[16] "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion.[17] Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a).[18] The testimony of a physician that no relationship exists between an injury and claimant's employment is sufficient to rebut the presumption.[19]

Once an employer offers sufficient evidence to rebut the presumption, the presumption is overcome and no longer controls the outcome of the case.[20] If the Section 20(a) presumption is rebutted, the causation issue is resolved based on the record as a whole, weighing all of the evidence.[21] The presumption does not apply, however, to the issue of whether a physical harm or injury occurred[22] and does not aid the claimant in establishing the nature and extent of disability.[23] In addition, a psychological impairment can be an injury under the Act if it is work

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[13] *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).

[14] *Id.*

[15] *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

[16] *See Gooden*, 135 F.3d 1066; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976); *Conoco, Inc. v. Director [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (5th Cir. 1999); *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29 (5th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (5th Cir. 1994).

[17] *Avondale Industries v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1988); *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 287 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence").

[18] *See Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

[19] *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

[20] *Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986).

[21] *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 261-262 31 BRBS 119 (4th Cir. 1997); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *Greenwich Collieries*, 512 U.S. 267.

[22] *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).

[23] *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

related.[24] Employers accept their employees with the frailties which predispose them to bodily injury.[25]

The opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances.[26]

EVIDENCE

Claimant testified at trial and deposition in pertinent part that:[27]

> He was born 15 Feb 54 in Cotija, Mexico. He had only four years of schooling and worked as a carpenter. He came to the United States in 1980. He speaks English, but just the basics. He can carry on only brief conversations. In the United States, he performed several different jobs. He worked in a factory cutting metal, put in tiles, drove a bobcat, and installed sprinkler systems. He also worked for a scaffold company and as a doorman at a country club. When he came to Texas, in 1998 or 1999, he started working in the shipyard.
>
> Before his accident on 25 Sep 03, he never had any problems with his lower back. He worked for Employer as a laborer. He did painting and cleaning. He greased the rooms for the docks and cleaned after welders. He threw sand for the sand blaster, put metal sheets, and picked up trash. He worked 12 hours a day and seven days a week. When Claimant worked for Employer prior to his accident, he never worked as a painter or a painter's helper.[28] He did work as a helper to the plate fitters. He also worked as a fire watch prior to his accident. Claimant's job with Employer entailed periodic lay offs when the job was over.
>
> Because of the current condition of his back, he does not think he could go back and do any of the jobs that he was doing for Employer before he was injured. The easiest one is as a painter, but all of the other ones are strenuous. He cannot bend over or kneel. He cannot pick up heavy things. Standing up causes him problems and he has to change from standing up to sitting down every two to three hours.
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> On the day of his injury they were moving wooden blocks in a floating dry dock. He was standing up on a concrete block six feet high by three feet wide. They were putting pieces of wooden blocks on top of the concrete block because they were going to bring in a rig.

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[24] *Director, OWCP v. Potomac Elec. Power Co.*, 10 BRBS 1048 (D.C. Cir. 1979).
[25] *Britton*, 377 F.2d at 147, 148.
[26] *Black & Decker Disability Planv. Nord.*, 538 U.S. 822, 825, 123 S.Ct 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (*citing Pietrunti v. Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary))..
[27] Tr.19-68; EX- 30 (as cited; see fn 4).
[28] Inconsistencies in the testimony.

The wooden logs were approximately the same width as the concrete block and they were to place three logs on top of the concrete block. Then there would be another wood block placed on top of the logs. At that point Claimant would be standing on top of the three wooden blocks. That was the first time that Claimant was required to put an extra wooden block on top.

The forklift picked the block up and he helped pull them from the forklift. He picked up a block of one foot by four, felt his back crack and had immediate pain just above the belt in the middle of his back..

That same day he filled out an accident report.[29] He had a lot of pain in his lower back. His left leg also bothered him and he could not walk very much.

He does not recall the date of the accident, but knows he filled out the report the same day. When he later asked the company about seeing a doctor, they told him his record was erased from the computer. They gave him a 1 Aug 03 date to use. He realized that was the wrong date when he asked for his record from the doctor. He recalls having the accident before the morning break at approximately 10:30 a.m.

After he reported his injury, the manager and safety man asked if he could continue to work. He told them that he had pain in his left leg, but would try. He asked to be taken to the doctor, but no one took him. He went to see the doctor on his own. The doctor checked him but did not have Claimant take his clothes off. The doctor did not speak Spanish. He sent Claimant back to work with a piece of paper to take back to the manager. Claimant told the doctor that he couldn't work, and the doctor called and talked to either the manager or the safetyman. He told Claimant that Claimant could work as a secretary, picking up the phone, but Claimant replied he could not speak enough English to do that. The doctor filled out a report saying that Claimant could return to regular duties, but Claimant could not walk. Claimant could not have a discussion with the doctor about going back to light-duty work because Claimant does not speak English. The doctor suggested that Claimant could answer the telephone. Claimant can speak a little English, but does not understand many questions.

Claimant went back and gave the paper to the manager. He told Claimant to go back to work, and Claimant told him that he couldn't even walk. The manager told Claimant if he went home, he would only get a half day pay. Claimant went home anyway. The manager told Claimant to come back for eight hours the next day to help with the wood blocks. The next day, the rig was coming in, and they were going to tie it down. Claimant said he would try.

Claimant went back to work the next day. He was stepping on a pedal to start bringing the rig inside. He stepped on the pedal for about an hour and went home. The second day after his accident, he painted. When Claimant went back to work immediately following his accident he did only painting. His back and left leg hurt just as much as the first day. He could not bend over. It was getting worse because he had to go up stairs, which was

[29] CX-8.

difficult. He was carrying a one gallon can of paint and a roller. He did that work for five or six weeks.

Claimant kept telling the manager and safety man that he had to see a doctor because he was in pain, but they said if he went they wouldn't pay him. The safety man told Claimant either eight Advil or eight Tylenol would take care of the pain. Every third or fourth day, he would tell them he wanted to go see a doctor.

He was finally laid off from Employer because he couldn't work more hours. The team manager let Claimant off after the accident because Claimant didn't want to work for twelve hours everyday. Claimant told him that he could work eight, but the manager wanted more time. Claimant worked less hours after his accident.

After about two weeks he went back to Employer as a fire watch with a new manager. He worked from six to six, seven days a week. However, he and other workers were laid off in December, when the project was done. He never told Employer he could not work as a fire watch, and could still work as one today, although he would want to see a doctor. He continued to apply for fire watch positions with Employer after he was laid off, but they never called him.

He continued to go to Employer and apply for jobs, but they never hired him back. He applied to be a laborer, but Employer knew that Claimant was hurt, so they would have to put him on fire watch. A fire watch is there to prevent welders from accidentally starting fires and is a light duty job. Claimant thinks Employer still uses fire watches.

From the day that Claimant was injured until the last time that he worked for Employer, he never went back to his original job. Employer never sent Claimant back to another doctor. The last day he worked for Employer, his low back and left leg were the same.

After Claimant hired an attorney, the attorney sent him to see Dr. Gunderson. He did not see a doctor for his back between the time he saw the company doctor and the time he first saw Dr. Gunderson. Dr. Gunderson sent Claimant to therapy, but the insurance company did not cover it. Dr. Gunderson doesn't speak Spanish. When he saw Dr. Gunderson, he always had an interpreter. He thinks his interpreters have been able to accurately convey to Dr. Gunderson the extent of his complaints. He can drive for a couple of hours. His son takes him to see Dr. Gunderson. It is a sixty-five to seventy mile trip. Claimant could drive to Dr. Gunderson's office if he needed to. It has been more than a year since he last saw Dr. Gunderson and he does not know when his next appointment is.

During 2004, he got a job with Gulf Copper as a fire watch. It lasted five or six weeks. It was the same job as at Employer with the same hours. He made an hourly wage of $10.00 or $10.25. His back and leg hurt while he did that job. Gulf Copper laid him off when the project was over. He did not apply back with Gulf Copper because his pain was bothering him and he was not familiar with the people there.

Between the time that he worked for Employer and the time that he worked for Gulf Copper, Claimant had no other jobs. He did work around his house. He put three or four windows in. They were three feet by three feet single-pane windows. He had help from his adult son.

When he was laid off by Employer, he applied for unemployment benefits and represented that he was ready and willing to work. He applied for fire watch jobs through the Texas Employment Commission. He applied to Employer, RR, and Gulf Copper.

He sustained a small leg fracture in 1981 or 1982 while playing soccer. He did not disclose that when previously asked because the question never specified what accident.

Since 2004 his leg and back are about the same. They hurt a little less because he doesn't do anything. If he tried to pick up anything, then they would hurt more. His back and leg hurt more when he just sits around the house all day. There are days his back feels better. Sometimes the pain interferes with his sleep. He can go up to two weeks without waking up at night, but sometimes the pain wakes him up. He can stand two and a half or three hours without pain. It hurts to bend over. He has constant numbness in his left leg.

About seven or eight months ago, he tried to carry a mattress with his wife and the pain came back.

He can sit for an hour and a half or two hours without having his back pain increase.

He has also had chest pain since the accident. He told his doctor, but they never checked anything. His chest started to hurt three or four months after the accident.

Claimant does not think he filed a tax return in 2005. He has not had any earnings from employment since he worked at Gulf Copper.

Employer's personnel records show in pertinent part that:[30]

Claimant applied to work for Employer as a helper in December 2002.

On 25 Sep 03, at 7:30, Claimant picked up a block of wood that was one foot by four foot and felt a pain in his waist/lower back..

He was laid off as part of a reduction in force on 13 Oct 03. He was hired back on 5 Nov 03 at a pay rate of $9.15/hour for 12 hour shifts. He was laid off again as part of a reduction in force on 20 Nov 03.

[30] CX-8.

Claimant's pay records show in pertinent part that:[31]

> Claimant's weekly pay from Employer for the three weeks including and following his 25 Sep 03 accident until his lay off was $455.22, $770.89, and $818.93.
>
> Claimant's total pay for the period in 2004 that he worked for Gulf Copper was $2,124.00.

Montet's Occupational Medicine Service records show in pertinent part that:[32]

> On 25 Sep 03 at 10:20 AM, Claimant presented with a history of moving a heavy object that morning and complaining of back pain. After a physical examination, Claimant was diagnosed as suffering from lumbar back pain. He was advised to take over the counter medication as needed and was released to regular duties. At 11:15 AM the doctor called and talked to Chris Doucett from Employer.

HealthSouth records states in pertinent part that:[33]

> A 17 Jun 05 MRI showed Claimant had slight degeneration and desiccation with mild central bulge and minimal central canal stenosis at L4-L5. There was no focal herniation. At L3-L4, Claimant had a slight annular disc bulge, but no evidence of disc herniation or central stenosis.

Dr. Clark Gunderson testified at deposition and his records indicate in pertinent part that:[34]

> He is a board certified orthopedic surgeon. He occasionally has referrals from Claimant's attorney, and Claimant was one. About one-third of his practice is spent treating workers' compensation patients. He will be paid $1,000 for the first hour of his deposition time. He is currently a plaintiff in a lawsuit for underpayments by workers' compensation carriers, including AIG.
>
> He first saw Claimant on 24 May 05. Claimant provided a history that he had been injured on 25 Sep 03. He related that as a laborer for Employer moving wood and felt pain in his lower back. He reported he went to the company physician who evaluated him and sent him back to work. He continued to have lower back pain and worked two more weeks on fire watch when he was laid off. He continued to have back pain, but had not been to any doctor since 2003.
>
> Dr. Gunderson examined Claimant. Claimant had lower back, left buttock, and leg pain all the way down to the foot. Most of the pain was in his leg. He described the pain as constant and worse with driving and sitting. Claimant had no bowel or bladder problems.

[31] CX-2; EX-24.
[32] CX-5; EX-18.
[33] CX-6; EX-14, 16, 19.
[34] CX-7,13; EX-13; 34.

Claimant reported no previous injuries to his lower back and said he had not worked since the date of the injury. Claimant's posture and gait were normal. He could bend so his fingertips were 12 inches from the floor. His left extensor hallucis longus had diminished strength and he had diminished sensation at the L5 and S1 dermatome on the left. His reflexes were symmetrical. Claimant had tenderness on the left sacroiliac sciatic notch ridge and his straight leg raising was positive at 45 degrees on the left. There was evidence of nerve root impingement.

Dr. Gunderson x-rayed Claimant's lumbar spine. There were some degenerative changes with spurs at L3-4 and L4-5. It was Dr. Gunderson's impression that Claimant probably had a disc herniation with radiculopathy. He recommended an MRI of the lumbar spine and an EMG of the left leg. He referred Claimant to physical therapy and gave him muscle relaxants and anti-inflammatory agents. He instructed Claimant to return in one month. The carrier approved the MRI, and a couple of physical therapy appointments, but not the EMG.

When Claimant returned on 21 Jun 05, he still had pain in his lower back and left leg. Dr. Gunderson reviewed the MRI report, which stated Claimant had degeneration and desiccation of the disc with a central bulge at L4-5 and a smaller bulge at L3-4. He gave Claimant a no-work letter and told him to go to physical therapy and come back in three weeks with the actual MRI films.

Claimant returned on 14 Jul 03 with the MRI films, which showed a bulging disc with narrowing of the foramen. Claimant still had the back and left leg pain and said he had been had been symptomatic for two years. Dr. Gunderson told Claimant he needed further investigative studies, including a myelogram, enhanced CT scan and EMG. He told Claimant that he needed more physical therapy and should not work until the studies were done. None of those studies were approved, and Dr. Gunderson has not seen Claimant again.

Complaints by Claimant of numbness in his left leg, sometimes turning to pain; increased back pain with bending over; having to change his position from standing to sitting and sitting to standing every two to three hours, and increased back pain with increased activity; would be consistent with the complaints he had at his last visit on 14 Jul 05.

He is willing to see Claimant again. If he is still having those complaints today, Dr. Gunderson would recommended investigative studies to try to determine where the pain was coming from, physical therapy, epidural steroid injections, and things of that nature. He would also continue his recommendation of no duty.

The incident Claimant described as having happened on 25 Sep 03 would be a mechanism for causing a low back injury. Based on Claimant's description, he believes that Claimant's complaints are related to that on-the-job incident.

He is under the impression that Claimant stated he did not return to work after the injury. The accuracy of that statement would factor into his determination of whether Claimant's injury was a result of the on-the-job incident or some other mechanism. Dr. Gunderson was also under the impression that Claimant said at the time of his visit that he could not work. He would not have recommended all the tests if he thought Claimant could work. If Claimant said he could return to some type of work, Dr. Gunderson would not dispute it.

Claimant's complaints could be caused by nerve root entrapment or nerve root irritation. Nerve root entrapment would show on the MRI, but nerve root irritation would not.

Dr. Jack McNeill testified at deposition and his records indicate in pertinent part that:[35]

He is a board certified orthopedic surgeon. He examined Claimant at the request of Employer on 13 Oct 05. Claimant provided a history that on 25 Sep 03 he lifted a heavy object and felt pain in his lower back into his left leg and foot. He reported he went to the company physician who evaluated him, gave him Advil, and sent him back to work. He continued to have pain while he worked two more weeks on light duty. Then he was laid off and has not worked since. He reported he had no treatment until his attorney sent him to Dr. Gunderson. He denied any prior back problems. He related current back and left leg pain and stated he cannot work.

Dr. McNeill conducted an examination and found normal gait with pain and tenderness, but no tightness in the mid-lumbar area. Claimant reported various levels of discomfort with flexion, extension, and rotation. He had negative supine straight leg raise and slightly left positive sitting straight leg raise test. Dr. McNeill found no atrophy or weakness.

Dr. McNeill reviewed the report of Claimant's June 2005 MRI.

He concluded Claimant suffered from lumbar strain with left sciatic nerve irritation. He believed Claimant's condition was stable and required no treatment. He opined that Claimant did not suffer any permanent impairment and could work, first at medium duty and then progressing to full duty.

Dr. Charles Xeller testified at deposition and his records indicate in pertinent part that:[36]

He is a board certified orthopedic surgeon and works out of an organization that provides doctors to employers and insurance companies for examinations. Carrier is one of its regular customers. He is paid about $150 for each examination, and $150 to $200 per hour for depositions. About 20 days a month he sees patients for the organization and sees about ten patients each day. He sees his own patients for treatment about five days each month.

[35] EX-17, 32.
[36] EX-20, 21, 31.

He was asked to conduct an independent medical evaluation of Claimant by the Department of Labor. He used the records to refresh his recollection of Claimant for his testimony and would not recognize Claimant if he saw him. He saw Claimant on 24 Jan 06, communicating through an interpreter. Claimant provided a history that he had been injured at work on 25 Sep 03 lifting a concrete block. He state he had stopped work on 20 Nov 03 and had not returned to work since then. He related that he believed he had treated with Dr. Gunderson, but was not sure. He explained he had had no active treatment and had not seen a doctor for eight months, but believed he could work if he did not have to do any heavy lifting. He complained of some pain in the high lumbar area and occasional numbness in his left lower extremity.

Dr. Xeller had no records to review, but conducted a physical examination. It showed no spasm, although lumbar back spasms can wax and wane. Claimant also had negative straight leg raising, Patrick, and Trendelenberg tests; normal reflexes; and no sensory deficit. His legs were equal in size. Claimant showed no signs of secondary gain or malingering. Dr. Xeller recommended an MRI and x-rays for the sake of completeness, but in the meantime believed Claimant had a resolved lumbar strain and could return to work with no further treatment.

Dr. Xeller later reviewed the records of Dr. McNeill, Dr. Montague, and Dr. Gunderson. He also reviewed an MRI dated 17 Jun 05 and noted nonspecific disc bulging but no evidence of frank herniated disc or neural structure impingement. The bulging appeared to be a function of the degenerative disc disease and disc desiccation that Claimant suffered consistent with his age. Claimant had changes of facet arthritis in his lower lumbar spine that were consistent with a 51 year old patient. His final opinion remained unchanged, except that he noted Claimant might benefit from a back support and over the counter anti-inflammatories. If the pain was more severe, prescription anti-inflammatories could be in order.

Dr. Xeller is aware that Dr. McNeill recommended Claimant start with medium duty and then progress to full duty. He understands that because of Claimant's long lay off from any work, Dr. McNeill might think that was necessary for reconditioning, and does not have any argument with that. However, he would not make the same recommendation because Claimant had no evidence of atrophy or a pinched nerve.

It is possible that the bulging on the MRI was a function of an incident as described by Claimant, which was a common form of injury to the low back. It is also possible that the incident aggravated the pre-existing degenerative bulge and caused the pain to flare up. Bulging discs can cause pain themselves. It would not be unreasonable for 51 year-old laborer with low back pain to say he could work if he did not have to do heavy lifting.

Although patients with lumbar spine problems not accompanied by radiating pain may initially complain about pain with activity, in the long run they benefit from activity and do not help themselves by lying around the house.

ANALYSIS

Dr. Gunderson testified that the event described by Claimant could have been a mechanism for causing a lower back injury. Based on Claimant's description, he believes that Claimant has a herniated disc and Claimant's complaints are related to that on-the-job incident. He does not believe that Claimant should return to any work at all until further diagnostics are completed. However, he relied on the accuracy of Claimant's statement that Claimant did not return to work after the injury in his determination of whether Claimant's injury was a result of the on-the-job incident or some other mechanism. He also relied on Claimant's statement that as of the time of his visit, Claimant could not work. Dr. Gunderson conceded that he would not have recommended all the tests if he thought Claimant could work. If Claimant said he could return to some type of work, Dr. Gunderson would not dispute it.

Dr. Gunderson's assessment relies heavily on the accuracy of Claimant's history and subjective complaints. While he is the treating physician, he only saw Claimant for a limited number of visits and has not seen him since July 2005.

Conversely, Dr. McNeill apparently gave less weight to Claimant's subjective reports and, based on his objective findings, including the absence of atrophy or weakness, concluded Claimant suffered from lumbar strain with left sciatic nerve irritation. He believes Claimant requires no treatment and can return to medium duty and then progress to full duty. He was hired by Employer to examine Claimant and saw Claimant only once, in October, 2005.

Dr. Xeller likewise gave Claimant's subjective complaints less weight and determined that Claimant could return to full duty. He believed that any work hardening Claimant might need would be not because of his back, but because he had been inactive for so long. Dr. Xeller was the last to examine Claimant and had the opportunity to do the most comprehensive records review. He conceded it is possible that the incident as described by Claimant caused the bulging disc on the MRI or aggravated a pre-existing degenerative bulge and caused the pain to flare up. However, Dr. Xeller found no evidence of frank herniated disc or neural structure impingement and determined that the bulging appeared to be a function of age related degenerative disc disease and disc desiccation. He also noted Claimant had changes of facet arthritis in his lower lumbar spine that were consistent with a 51 year old patient.

Dr. Xeller was aware that Dr. McNeill recommended Claimant start with medium duty and then progress to full duty, but believed that was a concession to Claimant's long lay off from any work. In any event, Dr. Xeller believes the absence of any evidence of atrophy or a pinched nerve means Claimant can return to full duty, although he might benefit from a back support and over the counter or prescription anti-inflammatories.

Dr. Gunderson testified that the incident described by Claimant could have caused a bulge and the Claimant's symptoms. Dr. Xeller conceded that such an incident could aggravate a pre-existing degenerative condition and lead to pain. That is sufficient to invoke the section 20 presumption as to the 25 Sep 03 incident as both an original cause and aggravation of a pre-existing condition.

However, Dr. Xeller saw nonspecific disc bulging but no evidence of frank herniated disc or neural structure impingement and testified the bulging appeared to be a function of degenerative disc disease and disc desiccation, along with facet arthritis in his lower lumbar spine, all of which were consistent with a 51 year old patient. Although he allowed for the possibility that an incident on 25 Sep 03, aggravated those conditions, his assessment was that Claimant had a resolved lumbar strain and could return to work with no further treatment.

Dr. Xeller's testimony is sufficient to rebut the presumption and place upon Claimant the burden of proof based on the entirety of the record. The opinions of the physicians stand largely in contrast. Claimant's counsel argues with great force that Dr. Xeller's opinion deserves little weight because the significant majority of his practice involves evaluating patients on behalf of employers and carriers. On the other hand, Dr. Gunderson regularly sees referrals from attorneys and is engaged in his own litigation against a carrier. Ultimately, those potentials for bias are not as significant as the degree to which the physicians rely on the accuracy of Claimant's history and complaints.

Dr. Gunderson based his determination that Claimant's injury was a result of the on-the-job incident because of Claimant's statement that he did not return to work after the injury. He based his treatment recommendations on Claimant's statement that he could not work. Whether or not Dr. Gunderson misapprehended what Claimant meant to say because of confusion or language difficulties, the fact was that Claimant did return to work and by his own concession could have worked in some capacity. Consequently, Dr. Gunderson's opinion is less probative than that of Dr. Xeller, who relied more heavily on objective data.

Similarly, Claimant's actions were inconsistent with his alleged injuries. Although he allegedly was in consistent pain which disabled him from his previous employment, he did not see a doctor for almost 20 months, and then only after being referred by an attorney. In the interim, he certified in his unemployment application that he was physically capable of work. Finally, although none of the physicians diagnosed malingering, Claimant conceded he could work as a fire watch, but did not seek employment in that capacity with one employer at least in part because he was not familiar with the people there. Claimant's actions do not corroborate the major point of his testimony.

Consequently, I find Dr. Xeller's opinion to be the most probative and accordingly do not find that Claimant carried his burden of showing that the entirety of the record establishes that the 25 Sep 03 incident caused or aggravated a pre-existing condition leading to his disc injury and associated complaints.

I find that the record shows that more likely than not, Claimant suffered a soft tissue lumbar strain that resolved before he was laid off and he suffered no loss of earning capacity as a consequence.

ORDER AND DECISION

The claim is **DENIED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge